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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 213

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (A NATIONAL BANKING ASSOCIATION), PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 300) is reported at 168 F. 2d 399. The opinion of the District Court (R. 106–112) is reported at 69 F. Supp. 932.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 301) was entered on June 8, 1948. The petition for a writ of certiorari was filed on August 11, 1948. The jurisdiction of this Court is invoked

under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.[1]

QUESTION PRESENTED

Whether, under the stipulated facts, the basis for computing the petitioner's allowance for depreciation under Sections 23 (l) and (n), 113 (b) (1) (B), and 114 of the Revenue Act of 1938 and the Internal Revenue Code, upon its banking furniture and fixtures for the taxable years 1938 and 1939, for federal income tax purposes, should be reduced by the depreciation claimed in the petitioner's income tax returns for 1932 to 1935, inclusive, as held by the courts below, or only by the amounts properly allowable for those years as contended by the petitioner.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Treasury Regulations involved are printed in the Appendix, *infra*, pp. 19–23.

STATEMENT

This is a suit against the United States by the Bank of America National Trust and Savings Association (herein sometimes referred to as the taxpayer) for recovery of amounts paid as additional federal income tax for the year 1938 and 1939, and the only question involved is the proper basis for determining a reasonable allowance for

[1]Effective September 1, 1948, the jurisdictional basis for cases of this sort became 28 U. S. C. 1254.

depreciation upon the taxpayer's banking furniture and fixtures for those years. The facts necessary to a consideration of this issue were stipulated (R. 28–37, 38–68), and, so far as material here, are as follows:

For each of the years 1932 and 1933, Transamerica Corporation filed a consolidated return of income in which it included the income and deductions of the taxpayer, an affiliated company. Those returns disclosed a large consolidated net loss for each year, including net losses of $12,047,-167.29 and $10,827,436.79 for the taxpayer for 1932 and 1933, respectively. For the years 1934 and 1935, the taxpayer filed separate corporation income tax returns in which it reported net losses in the respective years of $13,689,532.14 and $11,-179,336.88 (R. 117–118).[2] In arriving at these net losses for the respective years, the taxpayer deducted the following amounts on its returns as depreciation (R. 117–118, 120):

Year:	Amount	Year:	Amount
1932	$1,947,819.34	1934	$1,620,826.23
1933	1,698,146.84	1935	1,546,767.79

Included in the above deductions for depreciation claimed by the taxpayer on its returns for those years were the following amounts deducted

[2] The net losses for 1934 and 1935 as found by the District Court seem to differ from the net losses reported on the 1934 and 1935 returns and as stipulated (R. 246, 254, 45). But if the finding is in error that error is not material to the question involved.

as depreciation on the taxpayer's banking furniture and fixtures (R. 118):

Year	Furniture	Fixtures	Total
1932	$335,718.78	$588,120.12	$923,838.90
1933	323,173.85	564,776.58	887,950.43
1934	316,130.67	553,757.42	869,888.09
1935	310,258.18	524,051.53	834,309.71
Total	1,285,281.48	2,230,705.55	3,515,987.13

The amounts charged off on the taxpayer's books as depreciation of furniture and fixtures for these same years were (R. 118):

Year	Furniture	Fixtures	Total
1932	$168,913.50	$343,962.21	$512,875.80
1933	170,441.84	336,503.66	506,945.50
1934	172,090.30	342,636.37	514,726.57
1935	190,641.70	374,517.80	565,159.50
Total	702,087.33	1,397,620.04	2,099,707.37

The deductions thus taken on the taxpayer's income tax returns for the years 1932 to 1935, inclusive, therefore exceeded the amounts charged off on its books as depreciation of the same property for the respective years involved by $410,963.10, $381,004.93, $355,161.52, and $269,150.21, or a total of $1,416,279.76 (R. 118–119).

Prior to 1931, the taxpayer deducted from gross income shown on its tax returns the same amounts for depreciation on its furniture and fixtures as it charged off on its books; that is, eight per cent per annum of the original cost and on an estimated useful life of 12½ years. In

1932, the taxpayer estimated that the useful life of its furniture and fixtures on hand December 31, 1931, was 12½ years from that date, and of new furniture 15 years from date of purchase. Thereupon it changed its depreciation rate for bookkeeping purposes by using a rate of eight per cent of the residual value (meaning cost less accumulated depreciation) of the furniture and fixtures on hand December 31, 1931, and six and two-thirds per cent on new acquisitions thereafter. However, the taxpayer continued to compute its depreciation at the rate of eight per cent per annum on original cost in computing its depreciation on its tax returns for each of the years 1932 to 1937, inclusive. For the years 1932 to 1937, inclusive, the taxpayer thus deducted from gross income on its tax returns a larger amount for depreciation on furniture and fixtures than it charged off on its books. However, for the years now involved (1938 and 1939), the taxpayer deducted the same amounts as it charged off (R. 119).

The taxpayer's returns for 1932, 1933 and 1934 were successively examined by local internal revenue agents. When each of those agents had proceeded far enough in his audit to develop the fact that no tax liability existed for the period under examination by him, he submitted to the Internal Revenue Agent in Charge a report to that effect with the recommendation that the return for the particular year be accepted as filed.

The reports and returns for those three years, after review and approval of each successive report in the office of the Internal Revenue Agent in Charge, were transmitted to the Bureau of Internal Revenue at Washington, D. C., with the recommendation of the field office that the returns be accepted as filed. When those returns and reports covering the years 1932, 1933 and 1934 were successively received by the Bureau they were reviewed, accepted and sent to the closed files (R. 120).

During February, 1937, an internal revenue agent began his audit and investigation of taxpayer's 1935 income tax return and spent several days at the taxpayer's office on that assignment. During the course of his audit he ascertained that depreciation had been taken on buildings and equipment and on furniture and fixtures to the extent of $487,999.41 in excess of that charged off on the books for the year 1935, and orally questioned the accuracy of the deduction in conversation with taxpayer's tax counsel. Taxpayer's tax counsel stated to the revenue agent that the depreciation taken on the return was excessive and requested him to cooperate in the preparation of corrected depreciation schedules. After some further check on other items in the return, the agent concluded that no matter what adjustments or corrections, including any possible correction of the depreciation deduction, might be made to the returned net loss, there still

would be no taxable income or tax due for that year. He then orally advised the taxpayer's tax counsel of his conclusion and also advised him that under the practice of the Internal Revenue Agent's office he could not compile or aid in the compilation of revised depreciation schedules for the purpose of adjusting the depreciation deduction where he was satisfied that the adjustments would not offset the net loss reported on the tax return (R. 121).

On July 9, 1937, the same revenue agent submitted a report to the Internal Revenue Agent in Charge at San Francisco recommending that the 1935 return of the taxpayer be accepted as filed. That report, after review and approval in the office of the Internal Revenue Agent in Charge, was forwarded with the 1935 return to the Bureau with the recommendation that the taxpayer's 1935 return be accepted as filed. When that 1935 return and report were received in the Bureau, the return was reviewed, accepted and sent to the closed files (R. 121–122).

The procedure followed by the Bureau of Internal Revenue and its field agents in connection with the examination, audit and review of the above-mentioned income tax returns for the years 1932 to 1935, inclusive, is in accordance with the established administrative practice of the Bureau in such cases (R. 122).

No other action than herein stated has ever been taken by the Commissioner of Internal Revenue

with respect to the income tax returns of the taxpayer for the years 1932 to 1935, inclusive (R. 122).

The income tax return filed by the taxpayer for 1936 also showed a net loss and was handled in the same manner. After review by the Bureau it, too, was accepted and sent to the closed files. Subsequently, in June, 1939, the Bureau, in connection with the audit of the taxpayer's 1937 return, reaudited the taxpayer's 1936 return and determined deficiencies in income tax for both years which were due in part to the Commissioner's disallowance of excess depreciation taken on the taxpayer's furniture and fixtures.[5] The taxpayer appealed from that determination to the Tax Court and later, in a settlement of the various issues involved in the 1936–1937 case, the taxpayer abandoned its contentions with respect to the disallowance of excess depreciation with the express understanding that the settlement for those years was made without prejudice to either party as to any issue involved in the determination of the taxpayer's income tax liability for subsequent years (R. 122–123).

Under the applicable Treasury Regulations, rulings and administrative procedure in effect when the original income tax returns of the tax-

[5] For the year 1936, the taxpayer had deducted $845,024.08 as depreciation, of which the Commissioner disallowed $492,240.97; and for the year 1937 it had deducted $884,399.58, of which the Commissioner disallowed $489,595.25 (R. 123).

payer were filed for the years 1932 to 1935, inclusive, and when those returns were examined and reviewed by the Bureau of Internal Revenue, taxpayers were not required to charge off upon their books the same amounts of depreciation as had been deducted from gross income in their income tax returns, provided they maintained appropriate auxiliary records and furnished to, or submitted for inspection by, representatives of the Bureau sufficient detailed data or schedules to enable the Bureau's representatives to check or verify the correctness of the deduction taken (R. 123–124).

The taxpayer filled out Reconciliation Schedule L on page three of its income tax returns for the years 1932 to 1935, showing that the depreciation deducted in its returns exceeded the depreciation charged off on its books for each of those years (R. 124).

Irrespective of the discrepancy between the depreciation upon furniture and fixtures as charged off upon the books and as taken in the taxpayer's income tax returns for the years 1932 to 1935, inclusive, official revision of the depreciation schedules was not considered by the Bureau of Internal Revenue until an audit was made of a return showing a tax liability (R. 124).

In December 1939, when an engineer revenue agent called upon representatives of the taxpayer to discuss a procedure for revision of the taxpayer's depreciation schedules in connection with

the Bureau's then pending examination of its income tax returns for the years 1937, 1938, and 1939 and its pending reexamination of taxpayer's income tax return for the year 1936, the statute of limitation had already run with respect to the years 1932 to 1935, inclusive (R. 124).

Subsequently, the revenue agents made an audit for the years 1936 to 1939 and submitted reports covering those four years. Those reports were submitted by the field agents in 1941 or later and included, among other things, a revised schedule of depreciation of the furniture and fixtures for the years 1932 to 1935, inclusive, and a readjustment of the depreciable base as of December 31, 1935. The revenue agents "allowed" as the annual deductions for depreciation the amounts charged off on the books therefor and added to the unexhausted base as of December 31, 1935, the aggregate amount of excess depreciation deducted in the tax returns for each of the years 1932 to 1935, inclusive. This addition was disapproved by the Commissioner (R. 124–125).

In auditing the taxpayer's returns for 1936, 1937, 1938, and 1939, the Commissioner made certain determinations as to the useful life of the taxpayer's furniture and fixtures which are not material here. In applying such determinations in computing the taxpayer's allowance for depreciation for the years 1938 and 1939 the Commissioner used the unexhausted base of such furniture and fixtures as of December 31, 1935, as

reflected on the tax return for 1935, rather than the unexhausted base as shown on that return increased by the excessive depreciation deducted by the taxpayer in its returns for the years 1932 to 1935, inclusive, as was done by the examining agents (R. 125–126).

After the commencement of this action, the parties agreed that the amounts charged off upon the taxpayer's books as depreciation of its furniture and fixtures in each of the years 1932 to 1935, inclusive, were a reasonable provision for such depreciation in those years (R. 126).

The Commissioner has consistently used the cost of taxpayer's furniture and fixtures as taken from the books of the taxpayer in computing its allowance for depreciation of that property (R. 126).

On April 21, 1945, Transamerica Corporation filed amended consolidated corporation income tax returns, including therein amended income tax returns of the taxpayer, for the years 1932 and 1933; and on the same date the taxpayer filed amended income tax returns for the years 1934 and 1935. Those amended returns showed that the taxpayer (for income tax purposes) sustained net losses in each of those four years. In each of those amended returns the taxpayer recomputed its deduction for depreciation of furniture and fixtures to conform to the depreciation of that property as charged off upon its books for those same years (R. 126).

Under the established administrative practice of the Bureau of Internal Revenue during the period now under review, when amended returns are filed by any taxpayer such returns are given consideration and are acted upon only if filed within the statutory period of limitation applicable to the period covered by the amended return (R. 126–127).

Up to the time of the execution of the two stipulations of fact submitted and filed in this proceeding, the Bureau of Internal Revenue has never given any consideration to the amended returns filed by, or in behalf of, the taxpayer in April 1945, for the years 1932 to 1935, inclusive (R. 127).

After the case was submitted to the District Court, counsel for the taxpayer filed a motion to set aside the order of submission and for leave to submit further evidence consisting of a form letter sent to Transamerica Corporation, dated July 31, 1946, over the signature of the Internal Revenue Agent in Charge at San Francisco, stating that upon examination of its income tax returns for 1932 and 1933 the conclusion had been reached that they should be accepted as correct (R. 69–74). The Government filed an objection to this motion (R. 75–105). The motion was denied (R. 113).

On the basis of the foregoing facts, the District Court sustained the Commissioner's allowance for depreciation of taxpayer's banking furniture

and fixtures for the years 1938 and 1939 (R. 127–130), and its decision was affirmed by the Circuit Court of Appeals (R. 300).

ARGUMENT

There is no sufficient basis upon which to grant the writ sought in this case. The decision below is not, as the taxpayer contends (Pet. 17–18), in conflict with the decision of this Court in *Virginian Hotel Co.* v. *Helvering*, 319 U. S. 523, rehearing denied, 320 U. S. 810. On the contrary, as the courts below held, the decision in *Virginian Hotel Co.* v. *Helvering, supra,* would require an affirmance of the decision in this case. Indeed, the facts with respect to the instant case were called to the attention of this Court in the petition for rehearing in the *Virginian Hotel Co.* case, and the situation here presented was used by counsel in that case as one of the illustrations of alleged unfairness which would result from this Court's decision.

In the *Virginian Hotel Co.* case this Court held that under the same provisions of law here involved excessive amounts deducted from gross income in prior years as depreciation should be deducted from the cost of the property in question in determining the adjusted bases of the property for current taxable years although in those earlier years no tax benefit resulted to the taxpayer from such excessive deductions. A review of the question by this Court again was sought

in a petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in *Repplier Coal Co.* v. *Commissioner,* 140 F. 2d 554. Certiorari was denied. 323 U. S. 736.

The only difference between the instant case and the *Virginian Hotel Co.* case is that here the taxpayer has gone to great lengths to show that representatives of the Bureau of Internal Revenue examined its income tax returns for the prior years and were aware of the fact that the taxpayer had deducted on its income tax returns for 1932 to 1935, inclusive, substantially larger amounts as depreciation on its furniture and fixtures than it had charged off on its books for the same years, while in the *Virginian Hotel Co.* case nothing was shown with respect to the Commissioner's disposition of the prior year returns in which excessive depreciation had been deducted. But the usual Bureau procedure in such matters, shown by the record in this case, also obtained in the prior years involved in the *Virginian Hotel Co.* case, and there is every reason to believe that the returns there were handled in the same manner, at least to the point of determining that no tax would be due in the net loss years by reason of the correction of any errors.

It was stipulated in the District Court that the amounts set up on the taxpayer's books as depreciation on furniture and fixtures represented a reasonable allowance for those years (R. 126).

The taxpayer would have this Court infer from this fact that the Commissioner was aware at all times during this period that its deductions for depreciation were excessive—and by how much. But while there is evidence that the Commissioner was aware of the difference between the amounts deducted in its tax returns and the amounts set up on its books, there is no evidence that there was any determination at that time as to which amounts represented a reasonable allowance for such depreciation for income tax purposes. Representatives of the Bureau of Internal Revenue proceeded with their examination of the returns for 1932 to 1935, inclusive, only far enough to determine that no tax would be due regardless of which amount represented a reasonable allowance for depreciation.

The acceptance by the Commissioner of the taxpayer's returns as filed does not, under the circumstances, constitute a "challenge" of the deductions claimed, as contended by the taxpayer (Pet. 17–18, Br. 38–42). This argument of the taxpayer is based upon that part of the opinion in the *Virginian Hotel Co.* case, *supra,* where this Court, after explaining the purpose of the provision involved, said (p. 527):

> Under our federal tax system there is no machinery for formal allowances of deductions from gross income. Deductions stand if the Commissioner takes no steps to challenge them. Income tax returns entail

> numerous deductions. If the deductions are not challenged, they certainly are "allowed", since tax liability is then determined on the basis of the returns.

In the same case this Court also used the word "challenge" when it said (pp. 524–525): "Petitioner does not challenge the new rates" determined by the Commissioner. In other words, the new rates had not been made an issue between the parties. And in speaking of deductions generally this Court clearly meant that the deduction should be considered "allowed" for tax purposes unless it had been made an issue between the parties. This Court added (p. 527): "Apart from contested cases, that is indeed the only way in which deductions are 'allowed' "; i. e., when tax liability is determined on the basis of the returns. Hence, where, as here, the Bureau examination has proceeded to the point where it is clear there is no tax liability regardless of any possibly questionable items, and the returns are accepted as made, it cannot be said that questionable deductions have been "challenged" by the Commissioner or disallowed by him.

Nor does the Circuit Court of Appeals' application of this Court's decision in the *Virginian Hotel Co.* case, *supra,* bring it into conflict with the decisions in *Commissioner* v. *Mutual Fertilizer Co.,* 159 F. 2d 470 (C. C. A. 5th); and *Commissioner* v. *Cleveland Adolph Mayer Realty Corp.,* 160 F. 2d 1012 (C. C. A. 6th), as con-

tended by the taxpayer (Pet. 18–19, 20, 48). Those cases merely hold that the Tax Court erred in determining the amount of depreciation "allowable" under the statute in prior years, where no deduction had been claimed, by facts known many years after rather than by facts which were known at the time the deductions should have been claimed.

The taxpayer's contention (Pet. 18–20, 47–49) that the decision below is in conflict with the decisions of this Court in *New Colonial Co.* v. *Helvering,* 292 U. S. 435, and *Manhattan Co.* v. *Commissioner,* 297 U. S. 129, scarcely needs comment. Neither case even remotely involves the question presented here. The taxpayer merely relies upon the general premise, recognized in both decisions, that deductions from income are allowed only as a matter of legislative grace, and that any taxpayer claiming a deduction must bring himself within the provisions of the statute allowing it. From this the taxpayer argues (Br. 47–49) that the Commissioner cannot lawfully allow an unauthorized deduction. Hence the excess depreciation deductions must be assumed to have been disallowed. The idea is novel, but without merit. In substance, the taxpayer's position is that the Commissioner was charged with the duty of correcting its erroneous returns, regardless of any resulting tax liability. But the income tax statutes have always placed upon the taxpayer the obligation to make a correct

return, and the record in this case clearly shows that the taxpayer, knowing its returns for 1932 to 1935, inclusive, to be erroneous, waited for the Commissioner to correct them because of the labor and expense which would have been entailed if it had undertaken the task.

What has been said answers the taxpayer's contention (Pet. 21–22, 50–51) that it should be permitted to correct its mistakes. But it did not try to correct its mistakes for 1932 to 1935 until the statute of limitations had run as to those years, and while no revenue would be lost by permitting such corrections for those years, allowance would defeat the purpose of Congress in enacting the statutory provisions here involved. *Virginian Hotel Co.* v. *Helvering, supra.*

CONCLUSION

The decision below is correct. It is supported by the facts and the law, and is not in conflict with any other decision. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1948.

APPENDIX

Internal Revenue Code:[3]

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(l) [as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 121] *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * * *

(n) *Basis for depreciation and depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

* * * * *

(26 U. S. C. 23.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

---

[3] The provisions of Sections 23 (l), (n), 113 (a), (b) (1) (B), and 114 of the Revenue Act of 1938, c. 289, 52 Stat. 447, are substantially the same as the corresponding provisions of the Internal Revenue Code.

(b) *Adjusted basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General rule.*—Proper adjustment in respect of the property shall in all cases be made—

* * * * *

(B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws.

* * * * *

(26 U. S. C. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for Depreciation.* The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property.

* * * * *

(26 U. S. C. 114.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:[4]

Sec. 19.23 (l)–4. *Capital sum recoverable through depreciation allowances.*—The capital sum to be replaced by depreciation

[4] The provisions of Articles 23 (l)–4, 23 (l)–5, 23 (l)–9, 113 (b)–1, and 114–1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, are substantially the same as the corresponding provisions of Regulations 103.

allowances is the cost or other basis of the property in respect of which the allowance is made. * * *

Sec. 19.23 (l)–5. *Method of computing depreciation allowance.*—The capital sum to be recovered shall be charged off over the useful life of the property, either in equal annual installments or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production. Whatever plan or method of apportionment is adopted must be reasonable and must have due regard to operating conditions during the taxable period. The reasonableness of any claim for depreciation shall be determined upon the conditions known to exist at the end of the period for which the return is made. If the cost or other basis of the property has been recovered through depreciation or other allowances no further deduction for depreciation shall be allowed. The deduction for depreciation in respect of any depreciable property for any taxable year shall be limited to such ratable amount as may reasonably be considered necessary to recover during the remaining useful life of the property the unrecovered cost or other basis. The burden of proof will rest upon the taxpayer to sustain the deduction claimed. * * *

A taxpayer is not permitted under the law to take advantage in later years of his prior failure to take any depreciation allowance or of his action in taking an allowance plainly inadequate under the known facts in prior years. * * *

Sec. 19.23 (l)–9. *Records of depreciable property.*—In order that the verification of depreciation allowances claimed by the taxpayer may be facilitated, depreciation

shall be recorded on the taxpayer's books, the amount measuring a reasonable allowance for depreciation either being deducted directly from the book value of the assets or preferably being credited to a depreciation reserve account, which should be reflected in the annual balance sheet. * * * Also, the taxpayer's books shall show the basis of the depreciable property and any adjustments thereto * * *. If a taxpayer does not desire to have his regular books of account show all of the factors entering into the computation of depreciation allowances, such factors shall be recorded in permanent auxiliary records which shall be kept with and reconciled with the regular books of account.

Sec. 19.113 (b) (1)–1. *Adjusted basis: General rule.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property is the cost of such property * * * adjusted to the extent provided in section 113 (b).

* * * * *

The cost or other basis must also be decreased by the amount of the deductions for exhaustion, wear and tear, obsolescence, amortization, and depletion to the extent such deductions have in respect to any period since February 28, 1913, been allowed (but such decrease shall not be less than the amount of deductions allowable) under chapter 1 or prior income tax laws. The adjustment required for any taxable year or period is the amount allowed or the amount allowable for such year or period under the law applicable thereto, whichever is the greater amount. A taxpayer is not permitted to take advantage in a later year of his prior failure to take any depreciation allowance or of his action

in taking an allowance plainly inadequate under the known facts in prior years. The determination of the amount properly allowable shall, however, be made on the basis of facts reasonably known to exist at the end of such year or period. The aggregate sum of the greater of such annual amounts if the amount by which the cost or other basis of the property shall be adjusted.

* * * * *

Sec. 19.114–1. *Basis for allowance of depreciation and depletion.*—The basis upon which exhaustion, wear and tear, obsolescence, and depletion will be allowed in respect of any property is the same as is provided in section 113 (a), adjusted as provided in section 113 (b), for the purpose of determining the gain from the sale or other disposition of such property, except as provided in section 19.23 (m)–3, relating to depletion based on discovery value, in section 19.23 (m)–4, relating to percentage depletion in the case of oil and gas wells, and in section 19.23 (m)–5, relating to percentage depletion in the case of coal mines, metal mines, and sulphur mines or deposits.

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